

As a prerequisite to any recommendation to the FCC on Verizon's Section 271 filing, the Board must require full structural separation of Verizon's wholesale and retail entities. 81

The Public Interest Standard of the federal Act requires that the Board implement a strict Code of Conduct to prevent violations of the federal and state prohibitions against cross-subsidization, as well as the remonopolization of the long distance market, before the Board can issue a recommendation regarding Verizon's 271 Application to the FCC. 89

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ATTACHMENTS

- 1 Statement of Qualifications
- 2 Verizon New Jersey responses to Data Requests Referred to in this Declaration
- 3 Verizon Long Distance Marketing and Sales Agreements with Verizon New Jersey and other Verizon BOC and former GTE Affiliates
- 4 Model of the Growth in Verizon New Jersey Long Distance Market Share

Before the

**STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

In the Matter of the Application of
Verizon New Jersey, Inc. for FCC
Authorization to Provide In-Region,
InterLATA Service in New Jersey

Docket No. TO01090541

DECLARATION OF LEE L. SELWYN

1 Introduction and Summary

2

3 Lee L. Selwyn, of lawful age, declares and says as follows:

4

5 1. My name is Lee L. Selwyn; I am President of Economics and Technology, Inc.
6 ("ETI"), Two Center Plaza, Suite 400, Boston, Massachusetts 02108. ETI is a research and
7 consulting firm specializing in telecommunications and public utility regulation and public
8 policy. My Statement of Qualifications is annexed hereto as Attachment 1 and is made a part
9 hereof.

10

11 2. I have presented testimony before this Board on a number of occasions dating back to
12 the mid-1970s. In May 1976, I submitted testimony that addressed numerous rate design
13 issues relative to New Jersey Bell's requested rate increase in Docket 7512-1251 on behalf of

1 the New Jersey Retail Merchants Association. In August 1978, I submitted testimony before
2 the Board on behalf of the New Jersey Retail Merchants Association in Dockets 7711-1136,
3 784-278, 784-279, concerning the pricing of New Jersey Bell's vertical services and terminal
4 equipment. In September 1992, I submitted testimony on behalf of the New Jersey Cable
5 Television Association in Docket T092030358, the first Plan for Alternative Regulation
6 ("PAR") proceeding. In August 1998, I submitted rebuttal testimony on behalf of AT&T
7 Communications of New Jersey, Inc. and MCI Telecommunications in BPU Docket
8 TO97100808 and OAL Docket PUCOT 11326-97N, the Selex/IMC Imputation proceeding.
9 In August and September of 2000, I submitted direct and rebuttal testimony, respectively, on
10 behalf of the State of New Jersey Division of the Ratepayer Advocate in BPU Docket
11 T099120934, a review of Verizon New Jersey's Competitive Telecommunications Plan and
12 extension of the existing Plan for Alternative Regulation. My most recent appearance before
13 the Board was in Docket No. TO01020095, the Board's review of Verizon New Jersey's
14 second Plan for Alternative Regulation ("PAR-2"), in which I have submitted testimony on
15 behalf of the Division of the Ratepayer Advocate addressing the overall structure of the Plan
16 as proposed by VNJ, its Petition to Reclassify Multiline Business Services as Competitive,
17 and the proposal by AT&T that Verizon New Jersey be reorganized into structurally separated
18 wholesale and retail affiliates.

19

20 3. I have been asked by the State of New Jersey Division of the Ratepayer Advocate
21 ("RPA") to examine the testimony being proffered by Verizon New Jersey ("VNJ" or
22 "Company") in support of its Application for authority, pursuant to Section 271 of the

1 *Telecommunications Act of 1996* (“TA96” or “Act”), to enter the in-region long distance
2 market, to provide an assessment of the Company’s claims as to the current state of
3 competition in the New Jersey local telecommunications market, to provide an analysis of the
4 potential impact upon competition in New Jersey’s interLATA long distance market that
5 would result from Verizon NJ’s entry into the long distance market while the Company
6 continues to maintain overwhelming dominance of the local telephone service market in the
7 state, and to provide an opinion as to whether “the requested authorization is consistent with
8 the public interest, convenience, and necessity.” In addition to my review of the Application,
9 testimony and supporting exhibits filed by Verizon NJ in this proceeding, I have also
10 reviewed the Company’s responses to data requests propounded by the Ratepayer Advocate
11 and by other parties. Copies of the Verizon NJ responses to which I will refer are provided
12 in Attachment 2 to this Declaration.

13

14 4. In this Declaration, I show that despite long-standing legislative and regulatory efforts
15 at both the federal and state levels to facilitate and encourage the development of effective
16 competition in the local telecommunications market, New Jersey’s dominant incumbent local
17 exchange carrier, Verizon NJ, persists in maintaining overwhelming dominance of both the
18 residential and business segments, as demonstrated by Verizon NJ’s failure to provide any
19 evidence of the geographic distribution of competition as alleged in its Petition. Additionally,
20 the lack of permanent cost-based UNE rates, real-world testing of OSS and enforcement
21 remedies, and a state universal service fund must be considered by the Board in assessing
22 whether Verizon’s Petition meets public interest standards. Moreover, without the necessary

1 competitive safeguards, Verizon NJ cannot now or in the future meet the requirements of the
2 Section 271(c)(2)(B) 14-point "Competitive Checklist" as long as it is permitted to pursue its
3 wholesale and retail operations on an integrated basis. Finally, I examine the impact upon
4 competition in the New Jersey interLATA long distance market were Verizon NJ permitted to
5 offer this service while still maintaining its current level of overwhelming dominance in the
6 local service market, and show that unless a serious and substantial change in the competitive
7 local services landscape were to emerge quickly and irreversibly, Verizon NJ will soon come
8 to dominate and ultimately monopolize the adjacent, currently highly competitive, long
9 distance market as well. Once VNJ has attained its sought-after interLATA entry, the
10 Company's incentive to comply on an ongoing basis with the "competitive checklist" will
11 rapidly dissipate, threatening the sustainability of the small amount of competition that has
12 developed thus far. And as long as VNJ continues to control the overwhelming share of the
13 local exchange service market, its ability to engage in "joint marketing" of local and long
14 distance service — particularly in the residential segment — will enable VNJ to rapidly
15 remonopolize the long distance market in New Jersey, resulting in higher prices in the future
16 for what is today a highly competitive service. For all of these reasons, approval of VNJ's
17 Section 271 Application is not in the public interest, and the Board should recommend to the
18 FCC that Verizon's Application be rejected.
19

The 1996 federal Telecommunications Act and its subsequent interpretations by the FCC grant a state commission broad authority, in reviewing a Section 271 application, regarding inquiries into the state of competition and the compliance of the BOC with the terms and conditions of Sections 271, 272, 251 and 252.

5. Section 271(d)(2)(B) expressly directs the FCC to engage in consultation with state commissions prior to acting on a BOC's Section 271 application:

Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection [271](c).

While the specific consultative role assigned by the federal statute to the state commissions is with respect to Section 271(c), the FCC has expanded the states' role to also include an examination as to the extent of competition and related public interest concerns. As the FCC has recognized:

Unless such competition emerges, one of the ultimate goals of the 1996 Act, telecommunications deregulation, cannot be realized, at least not without risking monopoly prices for consumers. It is often easy to lose sight of the fact that deregulation will affect not only federal regulation of the telecommunications industry, but state regulation as well. Indeed, because regulation of the prices that consumers pay for local telecommunications services is a matter of state control, Congress's goal of deregulation will be most strongly felt at the state level.¹

1. *In the Matter of Application of Ameritech Corp. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, *Memorandum Opinion and Order*, Rel. August 19, 1997 (*Michigan 271 Order*), at para. 19, 12 FCC Rcd 20543.

1 The FCC has strongly encouraged states to go beyond merely addressing checklist items, to
2 provide it with a comprehensive analysis of local competition in the state, noting that:

3
4 ... this information will be valuable to our assessment of the public interest,
5 and it is information which the state commissions are well-situated to gather
6 and evaluate. Accordingly, ... we suggest that the relevant state commission
7 develop, and submit to the Commission, a record concerning the state of
8 local competition as part of its consultation. In particular, state commissions
9 should, if possible, submit information concerning the identity and number
10 of competing providers of local exchange service, as well as the number,
11 type, and geographic location of customers served by such competing
12 providers. We recognize that carriers may view much of this information as
13 proprietary and that different states have different procedures for obtaining
14 and handling such information. Nevertheless, we encourage states to
15 develop and submit to the Commission as much information as possible,
16 consistent with state procedural requirements.²
17

18 The FCC has remarked unfavorably in its review of Section 271 applications when the state
19 PUC has elected *not* to provide this comprehensive analysis.³ Moreover, the FCC has made
20 clear that it will not do the BOC's homework for it — that is, it will not “conduct an inquiry
21 into the status of local competition ... in order to determine whether competing carriers are, in
22 fact, providing the type of service described in section 271(c)(1)(A)” — since “the ultimate
23 burden of proof with respect to factual issues remains at all times *with the BOC*.”⁴

24 2. *Id.*, at para. 34.

25 3. See, *In the Matter of Application by BellSouth Corporation, et al. Pursuant to Section*
26 *271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA*
27 *Services in Louisiana*, CC Docket No. 97-231, *Memorandum Opinion and Order*, Rel.
28 February 4, 1998 (“*Louisiana 271 Order*”), at para 12.

29 4. *Michigan 271 Order*, at para. 43, 12 FCC Rcd 20543, 20567, emphasis supplied.

1 6. In addition to addressing the Section 271(c)(2)(B) “competitive checklist,” the state
2 commissions’ consultative role thus also includes Section 271(d)(3)(C), which requires an
3 affirmative finding that “the requested authorization is consistent with the public interest,
4 convenience, and necessity.” Moreover, since intrastate interLATA services are regulated by
5 state commissions, in making its public interest assessment a state commission can certainly
6 be guided by applicable state statutes even, *and especially*, if the state statute differs from —
7 and perhaps even exceeds — the corresponding federal requirement. It would make no sense
8 for Congress to expressly assign to the states a consultative role in the Section 271 process if
9 the state commissions were confined solely to a minimalist review of the checklist items.

10

11 7. In addition to the duties that the New Jersey Board of Public Utilities (Board) holds
12 with respect to Sections 271 and 272, the Board is clearly also bound by the requirements of
13 Title 48 and of the New Jersey statutes regarding, *inter alia*, nondiscriminatory treatment of
14 competing providers,⁵ imputation of the tariff rates of noncompetitive services used by the

15 5. N.J.S.A. 48:2-21.19(e): “... [t]he following safeguards shall apply to the offering of any
16 competitive service by a local exchange telecommunications company: (1) the local exchange
17 telecommunications company shall unbundle each noncompetitive service which is
18 incorporated in the competitive service and shall make all such noncompetitive services
19 separately available to any customer under tariffed terms and conditions, including price, that
20 are identical to those used by the local exchange telecommunications company in providing
21 its competitive service; ... (4) nothing in the act shall limit the authority of the board, pursuant
22 to R.S. 48:3-1, to ensure that local exchange telecommunications companies do not make or
23 impose unjust preferences, discriminations, or classifications for noncompetitive services.”

1 ILEC in providing competitive services,⁶ cost allocation,⁷ and prohibitions against cross-
2 subsidization of competitive services by customers of noncompetitive services.⁸ This Board
3 has the obligation to carefully review the Verizon filing so that all New Jersey consumers not
4 only benefit from deregulation, but that indeed they do not become captive to a new
5 unregulated monopoly. Nothing in the federal statute precludes a state commission from
6 applying its own principles in *advising* the FCC as to whether the public interest requirement
7 has been satisfied. The FCC, in its *1997 Michigan 271 Order*, concluded that the
8 Congressional intent with respect to the 1996 Act was to ensure that each state commission
9 fulfilled the task of advising and assisting the FCC on a variety of issues raised in Section
10 271 filings. The *Michigan 271 Order* makes this broad role clear:

11
12 In requiring the Commission to consult with the states, Congress afforded
13 the states an opportunity to present their views regarding the opening of the
14 BOC's local networks to competition. In order to fulfill this role as

15 6. N.J.S.A. 48:2-21.19(e)(2) "... the rate which a local exchange telecommunications
16 company charges for a competitive service shall exceed the rates charged to others for any
17 noncompetitive services used by the local exchange telecommunications company to provide
18 the competitive service."

19 7. N.J.S.A. 48:2-21.18(d): "The board shall have the power to require an independent
20 audit or such accounting and reporting systems from local exchange telecommunications
21 companies as are necessary to allow a proper allocation of investments, costs or expenses for
22 all telecommunications services, competitive or noncompetitive, subject to the jurisdiction of
23 the board."

24 8. N.J.S.A. 48:2-21.16(a)(3): "Ensure that rates for noncompetitive telecommunications
25 services do not subsidize the competitive ventures of providers of telecommunications
26 service."; 48:2-21.18(c): "No local exchange telecommunications company may use revenues
27 earned or expenses incurred in conjunction with noncompetitive services to subsidize
28 competitive services."

effectively as possible, state commissions must conduct proceedings to develop a comprehensive factual record concerning BOC compliance with the requirements of section 271 *and the status of local competition* in advance of the filing [at the FCC] of section 271 applications.⁹

8. In addition to proper attention to the public policy concerns of the New Jersey telecommunications community — including ratepayers and CLECs — with regard to the specific requirements of the 1996 Act, Verizon New Jersey, as an incumbent local exchange carrier, is obligated to comply fully with Sections 251 and 252. The Section 271(c)(2)(B) “competitive checklist” essentially reiterates and refers to the Section 251/252 duties applicable to all ILECs, but in the case of Bell Operating Companies, Section 271 presents the *additional* compliance incentive in the form of the promise of in-region long distance entry. Thus, the Board should consider the full extent of Verizon NJ’s compliance with Sections 251/252 in general and with the Section 271(c)(2)(B) checklist items in particular, both as such compliance presently exists and as it is likely to be maintained on an ongoing basis into the future. In the *Non-Accounting Safeguards Order*, the FCC clearly recognized the capacity of a BOC to backslide on checklist compliance after it receives Section 271 authority:

Moreover, we need to ensure that the market opening initiatives of the BOCs continue after their entry into the long distance market. It is not enough that the BOC prove it is in compliance at the time of filing a section 271 application; it is essential that the BOC must also demonstrate that it can be relied upon to remain in compliance. This may be demonstrated in various ways. For example, we must be confident that the procedures and processes requiring BOC

9. *Michigan 271 Order*. at para 30, 12 FCC Rcd 20543, 20559., emphasis supplied.

1 cooperation, such as interconnection and the provision of unbundled network
2 elements, have been sufficiently available, tested, and monitored. Additionally,
3 we will look to see if there are appropriate mechanisms, such as reporting
4 requirements or performance standards, to measure compliance, or to detect
5 noncompliance, by the BOCs with their obligations. Finally, the BOC may
6 propose to comply continually with certain conditions, or we may, on a case-by-
7 case basis, impose conditions on a BOC's entry to ensure continuing compliance.
8 The section 271 approval process necessarily involves viewing a snapshot of an
9 evolving process. *We must be confident that the picture we see as of the date of*
10 *filing contains all the necessary elements to sustain growing competitive entry*
11 *into the future.*¹⁰
12

13 Thus, as part of its determination as to Verizon NJ's compliance with the Section 271(c)
14 requirements of the 1996 Act, the Board must consider evidence that the snapshot view of the
15 checklist items contains everything necessary to ensure Verizon NJ's *continued* compliance.
16 Such a consideration must not be limited to a cursory review of Verizon's current standing
17 with respect to the Section 271(c) checklist items, but must also include the plans of Verizon
18 NJ and its affiliates' provision of services to CLEC customers, possibilities of remonopo-
19 lization of the long distance market, and a level playing field for all competitive providers.
20

21 9. The FCC has recognized the significant potential for a BOC, after receiving Section
22 271 authority, to engage in significant anticompetitive behavior, harming the intrastate
23 interLATA market:

24
25 A BOC may have an incentive to discriminate in providing exchange access
26 services and facilities that its affiliate's rivals need to compete in the
27 interLATA telecommunications and information services markets. For

28 10. *Michigan 271 Order*, at para 22, 12 FCC Rcd 20543, 20555, emphasis supplied.

1 example a BOC may have an incentive to degrade services and facilities
2 furnished to its affiliate's rivals, in order to deprive those rivals of
3 efficiencies furnished to its affiliate's rivals, in order to deprive those rivals
4 of efficiencies that its affiliate enjoys. Moreover, to the extent carriers offer
5 both local and interLATA services as a bundled offering, a BOC that
6 discriminates against the rivals of its affiliates could entrench its position in
7 local markets by making these rivals' offerings less attractive.¹¹
8

9 The presence of effective competition in the local exchange service market would not
10 necessarily eliminate these incentives, but it would assuredly undermine a BOC's ability to
11 engage in the kind of anticompetitive and discriminatory conduct that the FCC here describes.
12

13 10. In this context, the Section 271(c)(2)(B) "competitive checklist" is more than merely
14 a "carrot" designed to incent the BOCs to comply with the more general market-opening
15 requirements of Sections 251 and 252. Rather, the arrival of effective competition lies at the
16 core of the national telecommunications policy that is embraced in the 1996 Act. Section 271
17 thus cannot be divorced from its public interest roots, which stem from the interLATA "line
18 of business restriction" imposed by the *Modification of Final Judgment* ("MFJ"), the 1982
19 Consent Decree entered into by the former Bell System and the US Department of Justice in
20 settlement of the 1974 *U.S. v. Western Electric et al* antitrust case.¹² Under the MFJ, BOCs
21 were prohibited from offering interLATA services *expressly to prevent them from extending*

22 11. *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and*
23 *272 of the Communications Act of 1934, as amended, First Report and Order*, 11 FCC Rcd
24 21905 ("Non-Accounting Safeguards Order"), at para. 11.

25 12. *U.S. v. Western Electric Co. et al.*, 552 F. Supp. 131 (D. D.C., 1982), *aff'd sub nom.*
26 *Maryland vs. U.S.*, 460 U.S. 1007 (1983); and *Modification of Final Judgment*, sec. VIII.B.

1 *their market power in the local exchange market to monopolize the (then potentially)*
2 *competitive long distance market.* And in fact competition in the long distance market has
3 thrived — and as a result prices have sharply decreased — in the nearly two decades since
4 the MFJ first went into effect in January 1984. The principle underlying Section 271
5 generally is that once there is sufficient competition in the *local* service market, it will then
6 no longer be possible for a BOC to extend its local monopoly into the adjacent long distance
7 market. The existence of but a single facilities-based competitor somewhere in any state —
8 one of the threshold conditions that a BOC must satisfy to obtain Section 271 approval¹³ —
9 is clearly not by itself sufficient to constrain the incumbent BOC's exercise of market power.
10 And indeed, if a BOC is authorized to offer in-region interLATA services while still
11 maintaining an effective monopoly in the local market despite the nominal presence of one or
12 a few "competitors," "the requested authorization" would clearly *not* be "consistent with the
13 public interest, convenience, and necessity" as required by Section 271(d)(3)(C).

14

15 **The absence of approved TELRIC-based UNE rates and real-world evidence that**
16 **CLECs are being afforded nondiscriminatory access to Verizon New Jersey's operations**
17 **support systems separately and collectively preclude a finding of Checklist item (2)**
18 **compliance at this time.**

19

20 11. Checklist item (2) requires that Verizon NJ provide nondiscriminatory access to
21 network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1).
22 Section 251 (c)(3) requires Verizon NJ, as the ILEC, to provide nondiscriminatory access to
23 network elements on an unbundled basis at any technically feasible point on rates, terms and

24 13. Section 271(c)(1)(A).

1 conditions that are just, reasonable and nondiscriminatory.¹⁴ The absence of approved
2 TELRIC-based UNE rates, real-world evidence that CLECs are being afforded nondiscrimin-
3 atory access to Verizon NJ's OSS separately and collectively preclude a finding of Checklist
4 item (2) compliance at this time.

5
6 **Permanent TELRIC-based UNE rates have not as yet been adopted by the Board.**
7

8 12. Section 252(d)(1) requires that a state commission's determination of the just and
9 reasonable rates for network elements shall be based upon the cost of providing the network
10 elements.¹⁵ The FCC has determined that prices for unbundled network elements must be
11 based upon the total element long run incremental cost ("TELRIC") of providing those
12 elements.¹⁶ Therefore, the Board's examination of Checklist item (2) necessarily requires a
13 finding that UNE rates in New Jersey are TELRIC compliant. In fact, in order for the Board
14 to recommend approval of Verizon's filing to the FCC, it must be assured that UNE rates are
15 cost-based pursuant to TELRIC methodology. For New Jersey, this presents a factual and
16 legal impossibility, and thus the Board has no basis for a recommendation that the FCC
17 approve Verizon NJ's Section 271 Application as filed.

18

19 14. 47 U.S.C. 251(c)(3).

20 15. 47 U.S.C. 252(d)(1).

21 16. *Local Competition First Report and Order*, 11 FCC Rcd at 15844-46, paras. 674-679;
22 47 C.F.R 51.501 *et. seq.*

1 13. In 1998, the Board identified, acknowledged, and accepted as fact that the absence of
2 cost-based UNE rates in New Jersey remained a barrier to entry in the local exchange service
3 market.¹⁷ Implicit in this finding, therefore, is the conclusion that Verizon NJ could not
4 provide other carriers wishing to compete in the New Jersey local exchange service market
5 with nondiscriminatory access to VNJ network elements. Indeed, the UNE rates that had
6 been set by the Board in the Generic Order¹⁸ were remanded by the United States District
7 Court for the District of New Jersey for a new determination by the Board as to TELRIC
8 compliant rates.¹⁹ The Court remanded based upon its finding that the Board's "...
9 assignment of numeric percentages to models ... were flawed ..." Such flaws amounted to
10 "arbitrary and capricious rulemaking."

11
12 14. In the recently litigated proceeding as required by the Court's remand, *I/M/O the*
13 *Board's Review of Unbundled Network Element Rates, Terms, and Conditions of Bell Atlantic*
14 *New Jersey*, BPU Docket No. TO00060365, this Board has not as yet issued an Order that

15 17. *Status of Local Competition: Report and Action Plan*, BPU Docket No. TX98010010
16 (July 1998), at 43 ["... the Board finds that until OSS and UNE issues have been addressed
17 and are no longer "barriers to entry," the Board cannot determine that either pricing issue
18 (i.e., Une rates and capped local service rates) raised in this proceeding is [sic] [not] a
19 "barrier to competition." The Board further finds that OSS and UNE access are of such
20 significance that no other issue can be argued to affect mass local market entry in the
21 residential market until OSS and UNE issues are resolved.]

22 18. *I/M/O Investigation Regarding Local Exchange Competition for Telecommunications*
23 *Services*, BPU Docket No. TX95120631 (December 2, 1997) ("*Generic Order*").

24 19. *AT&T, et. al. v. Bell Atlantic-New Jersey Inc., et.al.*, Civ. No. 97-5762 (D.C.N.J. June
25 6, 2000).

1 can be implemented and market-tested to determine whether this barrier to market entry no
2 longer exists in New Jersey's local exchange service market. Only then would it be fair to
3 conclude that Verizon NJ is providing UNEs consistent with the requirements of Section 271
4 of the 1996 Act.

5
6 15. It is well recognized that the FCC will reject a Section 271 application if basic
7 TELRIC principles are violated or if the state commission makes clear errors in factual
8 findings on matters so substantial that the end result falls outside the range that the reasonable
9 application of TELRIC principles would produce.²⁰ There can be no doubt that the current
10 UNE rates in New Jersey fall within this definition. As this is a threshold issue for the FCC
11 to consider in evaluation of a Section 271 application, and because there is no argument that
12 the Board-approved TELRIC compliant rates are not yet implemented, Verizon NJ's
13 application for Section 271 approval cannot merit Board or FCC consideration. Contrary to
14 Verizon NJ's assertion, it does not follow that this threshold criterion can be set aside — or
15 satisfied — by the true-up mechanism it asserts to offer CLECs. Indeed, there is not even the
16 suggestion by Verizon NJ that such rates as it negotiates *ad hoc* are TELRIC-compliant.
17 Those rates can only reflect what a burdened CLEC is willing to sign onto without any hope
18 of actually providing service on that basis. This truth is borne out by the persistent monopoly
19 status of the New Jersey local service market.

20 20. *In the Matter of the Application by Bell Atlantic New York for Authorization Under*
21 *Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State*
22 *of New York*, CC Docket No. 99-295, *Memorandum Opinion and Order*, Rel. December 22,
23 1999) at para. 81. (*New York 271 Order*)

1 **Verizon NJ has not yet demonstrated, by real-world experience, that it is providing**
2 **CLECs with nondiscriminatory access to OSS.**
3

4 16. The nondiscriminatory provision of access to operations support systems (OSS) and
5 the ability of competing carriers to combine unbundled network elements are integral
6 components of a BOC's obligation to provide nondiscriminatory access to network elements
7 as required by checklist item (2). The importance of nondiscriminatory access to OSS
8 systems to the development of meaningful local competition has been consistently and
9 repeatedly acknowledged by the FCC. The ability of competitors to place orders for
10 installation of service to their customers, as well as for maintenance, repair and billing
11 functions, are linked directly to Verizon NJ's OSS systems. The FCC has noted that without
12 nondiscriminatory access to a BOC's OSS systems. "a competing carrier 'will be severely
13 disadvantaged, if not precluded altogether, from fairly competing' in the local exchange
14 market."²¹ Its importance thus cannot be overstated.

15
16 17. The Board's review of Verizon NJ's Section 271 filing must therefore require an
17 analysis of the adequacy of the Company's provision of access to the critical OSS functions of
18 pre-ordering, ordering, provisioning, maintenance and repair, and billing. In prior Section 271
19 petitions, the FCC has analyzed whether the BOC has met the nondiscrimination standard for
20 each OSS function using a two step process, where it examines:

22 21. *Id.* at para. 83.

1 (1) whether the BOC has deployed the necessary systems and personnel to provide
2 sufficient access to each of the necessary OSS functions and whether the BOC is
3 adequately assisting competing carriers to understand how to implement and use all
4 of the OSS functions available to them; and
5

6 (2) whether the OSS functions that the BOC has deployed are operationally ready, as a
7 practical matter.²²
8

9 18. When performing the second half of the inquiry, the FCC examines performance
10 measurements and other evidence of commercial readiness to ascertain whether the BOC's
11 OSS is handling current demand and will be able to handle reasonably foreseeable demand
12 volumes.²³ Moreover, the FCC has stated that, in evaluating whether a BOC's OSS
13 functions are operationally ready, evidence drawn from *actual commercial usage* was deemed
14 the most probative form of evidence.²⁴
15

16 22. *Id.* at para. 87.

17 23. *Id.* at para. 89.

18 24. *In the Matter of the Application by SBC Communications, Inc. Southwestern Bell*
19 *Telephone Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell*
20 *Long Distance, pursuant to Section 271 of the Telecommunications Act of 1996 To Provide*
21 *In-Region, InterLATA Service in Texas*, CC Docket No. 00-65, *Memorandum Opinion and*
22 *Order*, June 30, 2000 at ¶ 102. (*Texas 271 Order*).

1 19. However, Verizon NJ's filing fails to provide any evidence of "actual commercial
2 usage" from which this Board can assess the true ability of Verizon NJ's OSS systems to
3 handle a realistic level of foreseeable demand in a thriving competitive market. Verizon NJ's
4 failure to provide *actual commercial usage data* falls short of and is inconsistent with its
5 filings made in other jurisdictions. In New York, Verizon provided *actual commercial usage*
6 *data* pertaining to provision of nondiscriminatory access to its application interfaces for all of
7 the pre-ordering functions that it provides to itself.²⁵ Commercial usage data was also
8 provided on the operations of Verizon-New York's maintenance and repair functionalities,
9 with carriers performing more than 40,000 maintenance transactions per month.²⁶ Moreover,
10 in Pennsylvania, the Section 271 review process provided a three-month window for the
11 collection of *actual commercial usage data* to assist the Pennsylvania PUC in its consultative
12 review of Verizon's Section 271 filing in that state.²⁷

13
14 20. Verizon NJ's alleged compliance with this checklist item relies primarily on the *draft*
15 report of the independent third-party testing performed by KPMG to support its assertions that
16 it has met the requirement of providing nondiscriminatory access to OSS – a report based
17 upon the actions of a pseudo-CLEC, and lacking any real-world verification or validation.

18 25. *Id.* at paras. 130, 133.

19 26. *New York 271 Order* at para. 214.

20 27. *Consultative Report on Application of Verizon Pennsylvania, Inc. for FCC*
21 *Authorization to Provide In-Region, InterLATA Service in Pennsylvania*, Docket No. M-
22 00001435, *Procedural Order*, Pennsylvania Public Utility Commission (November 29, 2000)
23 at 12.

1 The FCC has indicated that absent data on actual commercial usage, it will consider the
2 results of carrier-to-carrier testing, independent third party testing, and internal testing in
3 assessing the commercial readiness of a BOC's OSS.²⁸ Here, Verizon NJ relies upon mainly
4 one of these three criteria cited by the FCC to be considered if actual commercial usage data
5 is not provided. With the dearth of competitive entry by CLECs in New Jersey, this Board
6 cannot place any substantive value upon the results of the third party independent testing to
7 indicate how Verizon NJ's OSS would respond to real-world competitive entry levels.

8
9 21. Moreover, the performance data provided by Verizon NJ in its Performance
10 Measurements Declaration is equally unreliable due to the fact that there were no enforcement
11 mechanisms in place during the time period that this data was collected. Thus, Verizon was
12 not assessed any penalties for any failures in meeting the Carrier-to-Carrier guidelines, and
13 was basically given a free pass. The Performance Assurance Plan approved by the Board on
14 October 12, 2001, which will implement penalties that Verizon NJ will incur for failure to
15 meet the performance measurements, will not become effective until November 1, 2001.²⁹
16 Verizon NJ's current filing therefore lacks any evidence of its performance under the new
17 plan and the plan's ability to provide the proper incentive for Verizon NJ to not discriminate
18 against competitive carriers in its provision of OSS. Once again, this is inconsistent with
19 Verizon's filings in other jurisdictions, where a Performance Assurance Plan was already in

20 28. *New York 271 Order*, at para. 89.

21 29. *In the Matter of the Board's Investigation Regarding the Status of Local Exchange*
22 *Competition in New Jersey — Performance Standards Remedies*, BPU Docket No.
23 TX98010010 - Item 4B, October 12, 2001 BPU Agenda Meeting.

1 place and where performance data was available for review by the PUC in its assessment of
2 Verizon's filing.³⁰

3

4 22. This void in Verizon NJ's filing, coupled with the lack of actual commercial usage
5 data, serves only to underscore the inability of the Board to develop a full record such as that
6 sought by the FCC upon which it could provide a well-reasoned recommendation as to
7 Verizon NJ's satisfaction of this checklist requirement. Therefore, the Board must recommend
8 to the FCC that Verizon's petition be denied at this time.

9

10 **Verizon's Section 271 Petition does not include detailed information on the geographic**
11 **distribution of competitive activity.**

12

13 23. Mr. Bone's Declaration does not adequately demonstrate that competition exists for
14 CLECs in all areas of the state. Mr. Bone attempts to prove the geographic distribution of
15 competition in New Jersey by including exhibits to his Declaration that state the number of
16 CLEC facilities-based and resold lines by area code.³¹ However, the numbers cited in Mr.
17 Bone's exhibits still do not rise to the level of what Verizon NJ is required to prove in order
18 to gain Section 271 approval.³² Absent evidence that each and every geographic area in

19 30. In Pennsylvania, the PUC recognized the importance of the need for enforcement
20 remedies, and required that Verizon put one in place as a precondition to its recommendation
21 that Verizon's petition be approved.

22 31. Bone (Verizon NJ), Declaration, Attachment 101, Exhibit 2 & 3.

23 32. For example, Mr. Bone states that 280 residential lines are served by CLECs using
24 (continued...)

1 New Jersey is sufficiently open to competition, approval of this application runs the risk of
2 ignoring the vital importance of New Jersey ratepayers who face a single unregulated
3 monopoly carrier, Verizon NJ. Prior to approval of Verizon New York's Section 271
4 authority, the New York PSC investigated the extent of competition in each geographic area
5 of New York State.³³ The NYPSC accomplished this by dividing New York State into
6 seven regions,³⁴ and for each region the Commission listed the ILECs and CLECs serving that
7 region along with the number of access lines (business and residence) they each serve. As a
8 result, the detailed data in the New York PSC's annual report provides a basis for determining
9 whether consumers in every region of that state receive the benefits of competition. In
10 engaging in this type of analysis prior to the grant of Section 271 approval, the NYPSC was
11 able to definitively determine whether *all* consumers would benefit from Verizon's entry into
12 the interLATA market. In New Jersey, however, unless Verizon's filing contains detailed and
13 specific competitive information regarding each geographic region of New Jersey, the Board

14 32. (...continued)
15 their own facilities, 400 residential lines using UNE-P, and approximately 59,000 resold
16 residential lines. Bone (Verizon NJ), Declaration at para. 8. Mr. Bone also states that
17 "CLECs are serving business and residential customers in *each* area of the State." *Id.*,
18 emphasis supplied. In fact, the residential line figures he cites may well be contained within
19 a single area code, which would mean that in other areas of the state, no residential
20 competition is present. Additionally, neither Exhibits 2 nor 3 pertain to residential customers.
21 Hence, no evidence regarding the geographic distribution of competition, as it pertains to
22 residential customers, has been provided by Verizon NJ in its filing.

23 33. See New York Public Service Commission, Analysis of Local Exchange Service
24 Competition in New York State, as of December 31, 2000.

25 34. The regions included New York Metro, Albany, Binghamton, Buffalo, Poughkeepsie,
26 Rochester, and Syracuse. New York Metro was further divided into Manhattan; Bronx;
27 Staten Island, Brooklyn, and Queens; Long Island; and Northern.

1 cannot fully determine whether *all* New Jersey consumers would benefit from Section 271
2 approval or whether consumers would be harmed by approval of Verizon's application. As
3 filed, Verizon's application provides scant evidence that there is substantial facilities-based
4 competitive entry outside of a few core urban wire centers in New Jersey. Unfortunately, due
5 to the aggressive procedural schedule being demanded by Verizon together with Verizon's
6 failure to provide responsive answers to the Ratepayer Advocate's discovery requests, Verizon
7 NJ necessarily fails to establish a strong case as to the geographic distribution of competition
8 in the local residential markets.

9

10 **The existence of a state universal service plan has been recognized by other jurisdictions**
11 **as critical to supporting a determination that Section 271 approval is in the public**
12 **interest.**

13

14 24. The Board in *I/M/O Investigation Regarding Local Exchange Competition For*
15 *Telecommunications Services*, Docket No. TX95120631, intended to address the issue of the
16 effects of local competition on Universal Service that was to result in a decision by the
17 Board.³⁵ Evidentiary hearings regarding the Universal Service issue were bifurcated into
18 two portions.³⁶ Evidentiary hearings on the first portion were held on September 15, 16 and

19 35. New Jersey Board of Public Utilities, *I/M/O Investigation Regarding Local Exchange*
20 *Competition For Telecommunications Services*, Telecommunications Decision and Order at 4,
21 Docket No. TX95120631, (December 2, 1997) ("*Local Competition Proceeding*").

22 36. The first portion addressed the establishment of mandated discounts to schools,
23 libraries, and hospitals in addition to the definition of advanced telecommunications capability
24 and the establishment of levels of discounts for schools, libraries, and health care providers.
25 See Initial Brief on Behalf of the Division of the Ratepayer Advocate on Universal Service, at
26 (continued...)

1 18, 1997, and hearings on the second portion were held on October 27-31, 1997, and on
2 November 6-7 and 24-25, 1997. Initial briefs were filed on the Universal Service issue on
3 December 5, 1997, and reply briefs were filed on December 15, 1997. To date, the Universal
4 Service phase of the Local Competition proceeding is still pending before the Board.
5 Basically, this means that the Board has not as of this date decided to institute a state
6 Universal Service Fund. The Ratepayer Advocate contends that the establishment of a state
7 Universal Service Fund is essential to satisfying the public interest requirement of Section 271
8 because such a program ensures the availability of affordable service to all of the state's low
9 income ratepayers and the benefits of competition to those persons in high cost geographic
10 areas.³⁷ To date, 25 states have have instituted universal service plans,³⁸ and six of those
11 states, namely Connecticut, Kansas, Oklahoma, New York, Pennsylvania and Texas, have
12 received Section 271 approval. In fact, the Pennsylvania PUC, in evaluating Verizon PA's
13 Section 271 application, considered its ruling that had created a state Universal Service Fund
14 relevant to the Section 271 application.³⁹ Accordingly, in the absence of a Board decision

15 36. (...continued)

16 5. The second portion addressed the Universal Service Fund costs for all universal service
17 elements associated with policy issues, and a determination of the price and support levels of
18 Universal Service. *Id.*

19 37. See Brief and Appendix on Behalf of The Division of the Ratepayer Advocate on
20 Universal Service Policy Issues, at 3.

21 38. See, State Universal Service Fund Summaries, www.neca.org/susfa.htm, visited
22 10/22/01.

23 39. See Pennsylvania Public Utility Commission Consultative Report, at 8.

1 on Universal Service in New Jersey, Verizon is unable to satisfy the public interest
2 requirement of Section 271.

3

4 **Verizon's Section 271 Petition fails to meet the public interest standard because the**
5 **combined effects of the lack of competition in New Jersey's local telecommunications**
6 **market, coupled with Verizon's ability, upon obtaining Section 271 authority, to jointly**
7 **market local and long distance services, will permit the Company to become an**
8 **unregulated dominant monopoly in the interLATA long distance market.**
9

10 25. The MFJ had prohibited the divested BOCs from offering interLATA long distance
11 services. This *structural remedy* was adopted in order to prevent the BOC local service
12 monopolies from using their monopoly market power in the local services market to block
13 competition in the adjacent long distance market. Section 271 was adopted as a *replacement*
14 for the MFJ long distance line of business restriction, and established a process by which
15 BOCs could enter the "in-region" long distance market provided that they implemented a
16 series of specific measures that would have the effect of irreversibly opening their previously
17 monopolized local telecommunications markets to competitive entry. To the extent that the
18 *local* market itself becomes competitive, the BOCs' ability to exert market power in the
19 adjacent long distance market would be attenuated. Conversely, however, to the extent that
20 competition *fails to develop* in the local services market, the BOC will then have both the
21 incentive and the ability to exert market power in, and ultimately to remonopolize, the
22 adjacent long distance market.

23